SUPREME COURT U.S.
JAN 20 2010

No. 08-1520

In The Supreme Court of the United States

CITY OF DALLAS, TEXAS, *Petitioner*,
v.
ROWAN W. GOULD, DIRECTOR OF THE UNITED STATES FISH AND WILDLIFE SERVICE, *ET AL.*, *Respondents*.

On Petition For A Writ Of Certiorari To The United State Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN C. MARTIN
Counsel of Record
AMY B. CHASANOV
Crowell & Moring LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004-2595
(202) 624-2505

THOMAS P. PERKINS, JR.
CHRISTOPHER D. BOWERS
City of Dallas
1500 Marilla Street
Dallas, TX 75201
(214) 670-3519

Counsel for Petitioner

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PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION

Pursuant to Supreme Court Rule 15.6, Petitioner City of Dallas files this Reply to address the new points raised in Respondent Fish and Wildlife Service's ("FWS")[1] Opposition Brief.

INTRODUCTION

In this case, long-planned public water supplies were given short shrift to make way for a wildlife refuge. The decision below would deprive 1.8 million people of a public water supply without so much as an inquiry into the impact or even the slightest analysis of a municipality's ability to secure other water sources. FWS claims, without substantive explanation, that projecting beyond 20 years would be "speculative" even though state law *requires* assessment and planning for longer than that duration and the very impacts at issue here were assessed in the state process. FWS did not (i) consider the detailed information on environmental impacts or (ii) foster informed public participation, in derogation of NEPA's fundamental purposes. *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 768 (2004) (citation omitted).

FWS contends the Fifth Circuit's decision is defensible because it was "fact-based," but offers no principled basis on which to distinguish this case from other cases decided by this Court and other circuit courts. Because NEPA applies to *all* federal

[1] Respondents (Pet. at ii) are referred to collectively as FWS.

agencies and because the Fifth Circuit's decision conflicts with decisions of this Court and other circuit courts such that NEPA law is no longer uniform, this Court should grant the petition. *Thompson v. Keohane*, 516 U.S. 99, 106 (1995).

ARGUMENT

A. The Fifth Circuit's Approval Of FWS's Reliance On Outdated Information Conflicts With Ninth Circuit Decisions.

1. FWS misrepresents the data it used.

That NEPA requires agencies to use high quality data in EAs is beyond dispute. *See* Pet. at 29-30. Here, the EA's text and data on bottomland hardwoods (protection of which was a primary purpose of the refuge), wildlife, vegetation, environmental impacts, and socioeconomic conditions were all lifted, much of it *word-for-word*, from a 20-year-old draft EA which relied on even older data. *Compare* Pet. at 9, 30, 32, App. 12a-13a, 49a *with* Opp. at 15. The EA does not *mention* the vaunted "examination of the site in 2004" upon which FWS now relies. Opp. at 15. The record reflects no evidence that FWS relied on this 2004 visit or any other recent information in its decisionmaking.[2] Nor does the EA account for the fundamental fact that bottomland hardwoods landcover—the feature this refuge supposedly seeks

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[2] *See* USCA5 2770 (FWS had not visited most of site within 10 years before EA's preparation), AR554 (to extent FWS did visit portion of acreage, it noted significant logging over last 20 years).

to protect—*had dwindled from 71 percent to 31 percent* within the proposed refuge. App. 50a.

An agency cannot simply declare that its information is "sufficient." Opp. at 15. The record must actually reflect a "hard look." *See, e.g.*, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *New Mexico v. Bureau of Land Mgmt.*, 565 F.3d 683, 707 (10th Cir. 2009); *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 781 (10th Cir. 2006). FWS admits that agencies must be "*fully informed* with respect to the environmental consequences of their proposed projects." Opp. at 3 (emphasis added). FWS was not "fully informed" here. It approved the refuge without knowing what it was protecting or the full environmental consequences of its actions. Had FWS recently analyzed the refuge area, it would have learned of the degradation of the resources it sought to protect. If FWS decisionmakers had considered the loss of habitat, they likely would have recognized that other nearby areas were better suited for a refuge.[3] And, this location would have allowed for the City's planned reservoir. Pet. at 32 (citing App. 12a, 47a, 50a).

2. The Fifth Circuit's approval of FWS's reliance on outdated information conflicts with Ninth Circuit decisions.

The Fifth Circuit's decision approving FWS's actions directly conflicts with Ninth Circuit case law. Pet. at 31-32 & n.14. FWS claims there is no conflict

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[3] The City's own study (that FWS never considered) concluded that other areas were superior to the depleted section designated by FWS. App. 9a, 46a-47a.

because the cases cited by the City involve EISs or "procedural situations not presented here." Opp. at 16. Other than this empty declaration, FWS makes no attempt to distinguish two cases in the City's petition: *Lands Council v. Powell*, 395 F.3d 1019 (9th Cir. 2005) and *Klamath-Siskiyou Wildlands Center v. U.S. Forest Service*, 373 F. Supp. 2d 1069 (E.D. Cal. 2004).[4]

The conflict with *Lands Council* is particularly stark. There, environmental groups challenged the Forest Service's reliance upon 13-year-old fish habitat data in its EIS. The Ninth Circuit found that "any degradation or improvement in the last thirteen years" in fish habitat conditions was relevant to the agency's analysis. 395 F.3d at 1031. While the data relied upon by an agency need not be "immediate," the "lack of up-to-date evidence" on important environmental consequences prevents an agency from making accurate impact assessments. *Id.* The Ninth Circuit rejected the agency's reliance on this "stale" data. *Id.* Plainly, application of the Ninth Circuit's jurisprudence would have required FWS to update its environmental information (particularly on the bottomland hardwoods it sought to protect).

In *Klamath-Siskiyou*, the district court applied this high quality data standard *in an EA*. The district court found that the Forest Service's conclusions should not be based on "incomplete and outdated information" because that would render "the overall conclusions uncertain." *Klamath-Siskiyou*, 373 F. Supp. 2d at 1081. Without recent,

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[4] Westlaw indicates the Fifth Circuit's decision criticizes *Lands Council* and distinguishes *Klamath-Siskiyou*.

thorough surveys of certain geographical areas within the project area, the court found the agency did not know or understand its project's actual effects (in that case the presence of owls and their habitat). *Id.* The court concluded that the agency's ten-year-old information likely "dramatically misrepresents" the environmental impacts, rendering the agency unable to support its fundamental conclusions about the significance of the project's effects. *Id.* at 1081, 1083. In this case, the City's subsequent studies actually *demonstrate* that data in the EA "misrepresent" environmental conditions.

FWS goes so far as to suggest that NEPA allows agencies to use unreliable, antiquated data in EAs, but not EISs. Opp. at 15-16. That assertion is belied not only by the Ninth Circuit's jurisprudence, but by the CEQ's regulations, 40 C.F.R. §§ 1500.1(b), 1502.24, and an EA's fundamental purpose, *id.* § 1508.9(a)(1). *See* Pet. at 29-30. Nor could it meet NEPA's "hard look" standard. Under the EA standard advocated by FWS and approved by the Fifth Circuit, an agency need only a dim understanding of the current conditions on the very ground of its proposed action. Ignoring recent data essential to the purpose of an agency's proposed action is not a harmless departure from NEPA's mandatory requirements—it "greatly degrade[s]" NEPA's twin purposes. *New Mexico*, 565 F.3d at 708. If the Fifth Circuit's opinion is not corrected, it will provide legal cover for other federal agencies to ignore NEPA's data and scientific integrity requirements, and rely upon outdated information and assumptions in an EA or even an EIS.

B. The Fifth Circuit's Approval Of FWS's Refusal To Examine Suggested Alternatives Conflicts With Other Circuits.

1. FWS mischaracterizes the refuge's purpose and need.

As the petition explains (at 20), both FWS and the Fifth Circuit misstated the articulated purpose and need statement in FWS's EA, which in turn changed the legal analysis. Opp. at 13-14 ("preserving the Upper Neches habitat was the very purpose of the contemplated [agency] action"); App. 9a. This inaccuracy permeates FWS's Opposition and the Fifth Circuit's decision. FWS's FONSI and EA defined three broad purposes, protecting (i) migrating bird habitats, (ii) bottomland hardwoods, and (iii) compatible recreation opportunities.[5] These NEPA documents *never* geographically limited the refuge to the *Upper* Neches. And nothing in this purpose statement would prevent the reservoir and refuge from coexisting.

2. The City proposed a joint refuge/reservoir alternative.

Contrary to FWS's assertions (Opp. at 14, n.5), the City's comments on the EA explicitly recommended a joint refuge/reservoir alternative. USCA5 3644 (City requested "working together to develop a mutually beneficial proposal that incorporates both the Wildlife Refuge and Lake

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[5] *See* USCA5 2786-87 (EA), 3851-52 (FONSI).

Fastrill Reservoir").[6] FWS never performed even a cursory analysis of this alternative. The City subsequently identified an environmentally superior location that it believed would allow a refuge/reservoir alternative. FWS should have considered this alternative. *NRDC v. Evans*, 168 F. Supp. 2d 1149, 1160 (N.D. Cal. 2001) (EA alternatives inadequate because agency failed to address commenters' proposed alternatives, did not adequately explain that failure, and did not offer its own appropriate alternatives), *vacated in part on other grounds*, 316 F.3d 904 (9th Cir. 2003).

3. FWS was required to propose and study alternatives.

FWS—not the City—has the primary and nondelegable responsibility to propose alternative refuge locations.[7] NEPA requires *federal agencies* to "study, *develop*, and describe the appropriate alternatives to [the] recommended course[] of action in any proposal which involves *unresolved conflicts* concerning alternative uses of available *resources*." 42 U.S.C. § 4332(2)(E) (emphasis added); 40 C.F.R. § 1507.2(d); *New York v. Dep't of Transp.*, 715 F.2d 732, 742 (2d Cir. 1983) (42 U.S.C. § 4332(2)(E) applies to fresh water). That the City went so far as to prepare a subsequent study of available

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[6] Other commenters also discussed a feasible refuge/reservoir combination. *See* USCA5 2828-29, 2832-34, 4209-12.

[7] *Compare* Opp. at 14 n.5 *with Suffolk v. Sec'y of Interior*, 562 F.2d 1368, 1385 (2d Cir. 1977) and *Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975).

alternatives does not shift the responsibility for developing alternatives from FWS to the City.

4. The Fifth Circuit's decision on the alternatives conflicts with other circuits.

FWS's attempt to avoid precedent in the Second, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits depends on distorting the purpose and need for its proposed refuge. Case law in these jurisdictions holds that (i) alternatives fulfilling an EA's purpose and need are *per se* reasonable, (ii) alternatives cannot be limited to one geographical area if the agency's purpose and need statement is not similarly confined, and (iii) adoption of two nearly identical alternatives fails NEPA's "hard look" requirement. Pet. at 19-21. The City's proposed joint refuge/reservoir alternative would not have conflicted with the refuge's *stated purpose* and should have been included in FWS's range of alternatives. Pet. at 18, 22.

Furthermore, the cases the City cites are not factually distinguishable. Opp. at 14.[8] *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002) provides just one obvious example of a circuit conflict. There, the Tenth Circuit considered an agency's duty to discuss and evaluate appropriate alternatives in a "properly-drafted EA." *Id.* at 1120 (in an EA, agency must consider more than simply the proposed project and a no action approach). In *Davis*, the agency rejected various alternatives—including the combination of two or more options that cumulatively met the

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[8] The City does not agree that EIS cases discussing the alternatives analysis are inapplicable. Pet. at 19.

project's purpose and need—claiming they were too remote or speculative to be considered. *Id.* at 1121-22. The court held that the EA's detailed analysis of only two alternatives was arbitrary and capricious because the agency dismissed viable alternatives "in a conclusory and perfunctory manner." *Id.* at 1122; *see also Sabine River Auth. v. U.S. Dep't of Interior*, 745 F. Supp. 388, 399 (E.D. Tex. 1990) (FWS's EA considered a joint refuge/reservoir alternative, even though the planning for that reservoir was far more speculative and conducted before Texas adopted its current, more rigorous statutory water planning regime). Based on *Davis*, were the Tenth Circuit to decide this case, it would have required FWS to consider the City's proposal for a joint refuge/reservoir project.

C. The Fifth Circuit And FWS Misapply This Court's Precedent On Proximate Cause.

The refuge designation permanently[9] alters the range of water supply options available to the City, foreclosing the only reservoir the City had planned over the next 50 years and completely eliminating the most suitable site. Yet, the Fifth Circuit's interpretation of proximate cause excused FWS's decision to ignore the City's loss of a water supply source.

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[9] FWS asserts its refuge is permanent because only an act of Congress could divest the federal government of land once it is part of a refuge. USCA5 2803, 2812, 3855; App. 65a.

1. The Fifth Circuit and FWS omit an essential element of *Public Citizen* in their analyses.

In *Public Citizen*, this Court instructed that "courts must look to the *underlying policies or legislative intent* in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not." *Public Citizen*, 541 U.S. at 767 (quoting *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)) (emphasis added). The analysis is not, as FWS suggests, merely limited to drawing a "manageable" line. Instead, a reviewing court must draw the line between impacts included in the analysis and impacts deemed too remote or speculative to be included based upon NEPA's underlying policies. FWS drew its line too narrowly, excluding water supply impacts caused by the elimination of Fastrill Reservoir from a very limited array of potential water reservoir locations available to the City. In so doing, FWS failed to fulfill NEPA's underlying purposes: ensuring (i) agencies are fully informed of the environmental consequences of their actions, and (ii) the public is involved in the decisionmaking process. *Id.* at 768.

The Fifth Circuit endorsed FWS's claim that the impacts of its planned refuge on the City's future water supplies were too speculative to be considered. As evidence of that "speculativeness," the Fifth Circuit claims that the City and TWDB had neither taken any concrete steps toward constructing the reservoir nor "settled upon the exact position of the dam or footprint of the reservoir." App. 11a. FWS knew about the City's ongoing feasibility study and

subsequent study researching a joint refuge/reservoir combination. Nonetheless, FWS pushed ahead, issuing a FONSI on the basis of a draft EA. FWS claimed the reservoir was speculative and never considered the refuge's impacts on the City's long-term water supply. The Fifth Circuit endorsed this "know-nothing" approach, making no attempt to explain how this decision complied with NEPA.

The Fifth Circuit and FWS never justified their determinations that impacts on future water supplies are "speculative" under NEPA. FWS's decision to permanently preserve land along the Upper Neches disregarded both fundamental policies underlying NEPA. First, FWS did not analyze the serious long-term risks to public health caused by its interference with state and local water planning. Second, FWS deprived the public of the opportunity to weigh the merits of two distinct public benefits, and the ability to evaluate their impacts on local water supply. Put simply, FWS's decision on what was "speculative" excluded from consideration a major environmental impact, thereby thwarting the two purposes of NEPA.

2. The Fifth Circuit's decision conflicts with the Ninth Circuit's interpretation of speculativeness.

The Fifth Circuit claimed that the water supply impacts caused by FWS's decision to permanently preserve land were properly excluded from NEPA review because of the "uncertainty over whether the reservoir will be constructed and its impact on water supplies, and the long time frame for the project." App. 11a. The Fifth Circuit suggests that a

"concrete step" such as a permit is a key element in determining whether an impact—or the risk of an impact—is sufficiently related to a project to merit consideration in a NEPA document.

This approach stands in stark contrast to the Ninth Circuit's decision in *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, 449 F.3d 1016, 1029-30 (9th Cir. 2006). There, the Ninth Circuit held that it was unreasonable for the Nuclear Regulatory Commission ("NRC") to dismiss categorically the possibility of a terrorist attack on a nuclear waste storage facility as too remote or speculative for NEPA review. The Ninth Circuit noted that this Court, in *Metropolitan Edison*, explicitly did not address a situation, such as that presented in *Mothers for Peace*, in which "an agency is asked to consider effects that will occur if a risk is realized." *Metropolitan Edison*, 460 U.S. at 775 n.9. The Ninth Circuit held that the NRC failed to address comments that the proposed action would increase the risk of a terrorist attack on the site.

This case also concerns the impacts of a realized risk: the risk that Fastrill Reservoir would never be built. The City asked FWS to evaluate the water supply impacts of its decision to thwart the only reservoir planned for the next 50 years. If the refuge were not designated, the record suggests that there is at least as much likelihood that the City would construct Fastrill Reservoir as there is that terrorists would successfully attack a particular nuclear waste storage site. Indeed, the record reflects that the City is required by law to make long-range water plans, that the reservoir was always part of that planning, that the City was undertaking a feasibility study, and that the City

directly expressed its intent by requesting FWS to delay its action or find a way to accommodate both land use goals. Pet. at 3-5; TWDB Pet. at 7-10, 18-20, 24-27. The Ninth Circuit, applying these facts to this Court's NEPA proximate cause jurisprudence, would have required FWS to consider these water supply impacts.

CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, the City's petition should be granted.

Respectfully submitted.

JOHN C. MARTIN *Counsel of Record* AMY B. CHASANOV Crowell & Moring LLP 1001 Pennsylvania Ave., NW Washington, DC 20004-2595 (202) 624-2505 *Counsel for Petitioner*	THOMAS P. PERKINS, JR. CHRISTOPHER D. BOWERS City of Dallas 1500 Marilla Street Dallas, TX 75201 (214) 670-3519